

PROJECT NAME: \_\_\_\_\_

CITY COUNCIL APPROVAL

PROJECT NO.: \_\_\_\_\_

DATE: \_\_\_\_\_

**CONSULTING SERVICES AGREEMENT BETWEEN  
THE CITY OF MILPITAS AND  
KEYSER MARSTON ASSOCIATES, INC.**

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THIS AGREEMENT for consulting services is made by and between the City of Milpitas ("City") and Keyser Marston Associates, Inc., ("Consultant") as of \_\_\_\_\_, 2006.

**AGREEMENT**

**Section 1. SERVICES.** Subject to the terms and conditions set forth in this Agreement, Consultant shall provide to City the services described in the Scope of Work attached as Exhibit A at the time and place and in the manner specified therein. In the event of a conflict in or inconsistency between the terms of this Agreement and Exhibit A, the Agreement shall prevail.

- 1.1 **Term of Services.** The term of this Agreement shall begin on the date first noted above and shall end on December 31, 2006, the date of completion specified in Exhibit A, and Consultant shall complete all the work described in Exhibit A prior to that date, unless the term of the Agreement is otherwise terminated or extended, as provided for in Section 8. The time provided to Consultant to complete the services required by this Agreement shall not affect the City's right to terminate the Agreement, as provided for in Section 8.
- 1.2 **Standard of Performance.** Consultant shall perform all services required pursuant to this Agreement in the manner and according to the standards observed by a competent practitioner of the profession in which Consultant is engaged in the geographical area in which Consultant practices its profession. Consultant shall prepare all work products required by this Agreement in a substantial, first-class manner and shall conform to the standards of quality normally observed by a person practicing in Consultant's profession.
- 1.3 **Assignment of Personnel.** Consultant shall assign only competent personnel to perform services pursuant to this Agreement. Exhibit A shall name any specific personnel who shall be performing services. In the event that City, in its sole discretion, at any time during the term of this Agreement, desires the reassignment of any such persons, Consultant shall, immediately upon receiving notice from City of such desire of City, reassign such person or persons.
- 1.4 **Time.** Consultant shall devote such time to the performance of services pursuant to this Agreement as may be reasonably necessary to meet the standard of performance provided in Section 1.1 above and to complete Consultant's obligations hereunder.

**Section 2. COMPENSATION.** City hereby agrees to pay Consultant a guaranteed maximum price not to exceed \$ \$107,105.00 for all services to be performed and reimbursable costs incurred under this Agreement. City shall pay Consultant for services rendered pursuant to this Agreement at the time and in the manner set forth herein. The payments specified below shall be the only payments from City to

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Consultant for services rendered pursuant to this Agreement. Consultant shall submit all invoices to City in the manner specified herein. Except as specifically authorized by City, Consultant shall not bill City for duplicate services performed by more than one person.

Consultant and City acknowledge and agree that compensation paid by City to Consultant under this Agreement is based upon Consultant's estimated costs of providing the services required hereunder, including salaries and benefits of employees and subcontractors of Consultant. Hourly rates for personnel performing services shall be as shown in Exhibit B. Consequently, the parties further agree that compensation hereunder is intended to include the costs of contributions to any pensions and/or annuities to which Consultant and its employees, agents, and subcontractors may be eligible. City therefore has no responsibility for such contributions beyond compensation required under this Agreement.

**2.1 Invoices.** Consultant shall submit invoices, not more often than once a month during the term of this Agreement, based on the cost for services performed and reimbursable costs incurred during the billing period. Invoices shall contain the following information:

- Serial identification of bills;
- The beginning and ending dates of the billing period;
- A Task Summary containing the original contract amount, the amount of prior billings, the total due this period, the balance available under the Agreement, and the percentage of completion, if applicable;
- At City's option, for each work item in each task, a copy of the applicable time entries or time sheets shall be submitted showing the name of the person doing the work, the hours spent by each person, a brief description of the work, and each reimbursable expense;
- The total number of hours of work performed under the Agreement by Consultant and each employee, agent, and subcontractor of Consultant performing services hereunder, as well as a separate notice when the total number of hours of work by Consultant and any individual employee, agent, or subcontractor of Consultant reaches or exceeds 800 hours, which shall include an estimate of the time necessary to complete the work described in Exhibit A;
- The Consultant's signature.

**2.2 Monthly Payment.** City shall make monthly payments, based on invoices received, for services satisfactorily performed, and for authorized reimbursable costs incurred. City shall have thirty (30) days from the receipt of an invoice that complies with all of the requirements above and is otherwise acceptable to the City to pay Consultant. In the event that an invoice is not acceptable to the City, said invoice shall be returned to Consultant within thirty (30) days of the City's receipt of the invoice with a detailed explanation of the deficiency. City's obligation to pay a returned invoice shall not arise earlier than thirty (30) days after resubmission of the corrected invoice.

**2.3 Total Payment.** City shall pay for the services to be rendered by Consultant pursuant to this Agreement. City shall not pay any additional sum for any expense or cost whatsoever

incurred by Consultant in rendering services pursuant to this Agreement. City shall make no payment for any extra, further, or additional service pursuant to this Agreement.

In no event shall Consultant submit any invoice for an amount in excess of the maximum amount of compensation provided above either for a task or for the entire Agreement, unless the Agreement is modified prior to the submission of such an invoice by a properly executed change order or amendment. In the event that Consultant identifies additional work outside the scope of services specified in Exhibit A that may be required to complete the work required under this Agreement, Consultant shall immediately notify the City and shall provide a written not-to-exceed price for performing this additional work.

- 2.4 Hourly Fees.** Fees for work performed by Consultant on an hourly basis shall not exceed the amounts shown on Exhibit B.
- 2.5 Reimbursable Expenses.** Reimbursable expenses are shown on Exhibit B, and shall not exceed Five Thousand Dollars (\$5,000.00). Expenses not listed in Exhibit B are not chargeable to City. Reimbursable expenses are included in the total not-to-exceed amount of compensation provided under this Agreement.
- 2.6 Payment of Taxes.** Consultant is solely responsible for the payment of employment taxes incurred under this Agreement and any other applicable federal or state taxes.
- 2.7 Payment upon Termination.** In the event that the City or Consultant terminates this Agreement pursuant to Section 8, the City shall compensate the Consultant for all outstanding costs and reimbursable expenses incurred for work satisfactorily completed as of the date of written notice of termination. Consultant shall maintain adequate logs and timesheets in order to verify costs incurred to that date. The City shall have no obligation to compensate Consultant for work not verified by logs or timesheets.
- 2.8 Authorization to Perform Services.** The Consultant is not authorized to perform any services or incur any costs whatsoever under the terms of this Agreement until receipt of a written Notice to Proceed from the City.

**Section 3. FACILITIES AND EQUIPMENT.** Except as set forth herein, Consultant shall, at its sole cost and expense, provide all facilities and equipment that may be necessary to perform the services required by this Agreement. City shall make available to Consultant only the facilities and equipment listed in this section, and only under the terms and conditions set forth herein.

City shall furnish physical facilities such as desks, filing cabinets, and conference space, as may be reasonably necessary for Consultant's use while consulting with City employees and reviewing records and the information in possession of the City. The location, quantity, and time of furnishing those facilities shall be in the sole discretion of City. In no event shall City be obligated to furnish any facility that may involve incurring any direct expense, including but not limited to computer, cellular telephone, long-distance telephone, or other communication charges, vehicles, and reproduction facilities.

If the performance of the work specified in Exhibit A requires destructive testing or other work within the City's public right-of-way, Consultant, or Consultant's subconsultant, shall obtain an encroachment permit from the City.

**Section 4. INSURANCE REQUIREMENTS.** Before beginning any work under this Agreement, Consultant shall procure "occurrence coverage" insurance against claims for injuries to persons or damages to property that may arise from or in connection with the performance of the work hereunder by the Consultant and its agents, representatives, employees, and subcontractors. Consultant shall provide proof satisfactory to City of such insurance that meets the requirements of this section and under forms of insurance satisfactory in all respects to the City. Consultant shall maintain the insurance policies required by this section throughout the term of this Agreement and shall produce said policies to the City upon demand. The cost of such insurance shall be included in the Consultant's price. Consultant shall not allow any subcontractor to commence work on any subcontract until Consultant has obtained all insurance required herein for the subcontractor(s) and provided evidence thereof to City. Verification of the required insurance shall be submitted and made part of this Agreement prior to execution.

- 4.1 Workers' Compensation.** Consultant shall, at its sole cost and expense, maintain Statutory Workers' Compensation Insurance and Employer's Liability Insurance for any and all persons employed directly or indirectly by Consultant. The Statutory Workers' Compensation Insurance and Employer's Liability Insurance shall be provided with limits of not less than ONE MILLION DOLLARS (\$1,000,000.00) per accident. In the alternative, Consultant may rely on a self-insurance program to meet those requirements, but only if the program of self-insurance complies fully with the provisions of the California Labor Code. Determination of whether a self-insurance program meets the standards of the Labor Code shall be solely in the discretion of the City Attorney. The insurer, if insurance is provided, or the Consultant, if a program of self-insurance is provided, shall waive all rights of subrogation against the City and its officers, officials, employees, and volunteers for loss arising from work performed under this Agreement.

An endorsement shall state that coverage shall not be suspended, voided, canceled by either party, reduced in coverage or in limits, except after thirty (30) days' prior written notice by certified mail, return receipt requested, has been given to the City.

**4.2 Commercial General and Automobile Liability Insurance.**

- 4.2.1 General requirements.** Consultant, at its own cost and expense, shall maintain commercial general and automobile liability insurance for the term of this Agreement in an amount not less than ONE MILLION DOLLARS (\$1,000,000.00) per occurrence, combined single limit coverage for risks associated with the work contemplated by this Agreement. If a Commercial General Liability Insurance or an Automobile Liability form or other form with a general aggregate limit is used, either the general aggregate limit shall apply separately to the work to be performed under this Agreement or the general aggregate limit shall be at least

twice the required occurrence limit. Such coverage shall include but shall not be limited to, protection against claims arising from bodily and personal injury, including death resulting therefrom, and damage to property resulting from activities contemplated under this Agreement, including the use of owned and non-owned automobiles.

**4.2.2 Minimum scope of coverage.** Commercial general coverage shall be at least as broad as Insurance Services Office Commercial General Liability occurrence form CG 0001 (ed. 11/88) or Insurance Services Office form number GL 0002 (ed. 1/73) covering comprehensive General Liability and Insurance Services Office form number GL 0404 covering Broad Form Comprehensive General Liability. Automobile coverage shall be at least as broad as Insurance Services Office Automobile Liability form CA 0001 (ed. 12/90) Code 1 ("any auto"). No endorsement shall be attached limiting the coverage.

**4.2.3 Additional requirements.** Each of the following shall be included in the insurance coverage or added as an endorsement to the policy:

- a. City and its officers, employees, agents, contractors, consultants, and volunteers shall be covered as insureds with respect to each of the following: liability arising out of activities performed by or on behalf of Consultant, including the insured's general supervision of Consultant; products and completed operations of Consultant; premises owned, occupied, or used by Consultant; and automobiles owned, leased, or used by the Consultant. The coverage shall contain no special limitations on the scope of protection afforded to City or its officers, employees, agents, contractors, consultants, or volunteers.
- b. The insurance shall cover on an occurrence or an accident basis, and not on a claims-made basis.
- c. An endorsement must state that coverage is primary insurance with respect to the City and its officers, officials, employees, contractors, consultants, and volunteers, and that no insurance or self-insurance maintained by the City shall be called upon to contribute to a loss under the coverage.
- d. Any failure of CONSULTANT to comply with reporting provisions of the policy shall not affect coverage provided to CITY and its officers, employees, agents, and volunteers.
- e. An endorsement shall state that coverage shall not be suspended, voided, or canceled by either party, reduced in coverage or in limits, except after

thirty (30) days' prior written notice by certified mail, return receipt requested, has been given to the City.

- 4.3 Professional Liability Insurance.** If Consultant shall be performing licensed professional services, Consultant shall maintain for the period covered by this Agreement professional liability insurance for licensed professionals performing work pursuant to this Agreement in an amount not less than ONE MILLION DOLLARS (\$1,000,000) covering the licensed professionals' errors and omissions.

**4.3.1** Any deductible or self-insured retention shall not exceed \$150,000 per claim.

**4.3.2** An endorsement shall state that coverage shall not be suspended, voided, canceled by either party, reduced in coverage or in limits, except after thirty (30) days' prior written notice by certified mail, return receipt requested, has been given to the City.

**4.3.3** The policy must contain a cross liability clause.

**4.3.4** The following provisions shall apply if the professional liability coverages are written on a claims-made form:

- a. The retroactive date of the policy must be shown and must be before the date of the Agreement.
- b. Insurance must be maintained and evidence of insurance must be provided for at least three years after completion of the Agreement or the work, unless waived in writing by the City.
- c. If coverage is canceled or not renewed and it is not replaced with another claims-made policy form with a retroactive date that precedes the date of this Agreement, Consultant must provide extended reporting coverage for a minimum of five years after completion of the Agreement or the work. The City shall have the right to exercise, at the Consultant's sole cost and expense, any extended reporting provisions of the policy, if the Consultant cancels or does not renew the coverage.
- d. A copy of the claim reporting requirements must be submitted to the City prior to the commencement of any work under this Agreement.

**4.4 Requirements for All Policies.**

- 4.4.1 Acceptability of insurers.** All insurance required by this section is to be placed with insurers with a Bests' rating of no less than A.

**4.4.2 Verification of coverage.** Prior to beginning any work under this Agreement, Consultant shall furnish City with certificates of insurance and with original endorsements effecting coverage required herein. The certificates and endorsements for each insurance policy are to be signed by a person authorized by that insurer to bind coverage on its behalf. The City reserves the right to require complete, certified copies of all required insurance policies at any time.

**4.4.3 Subcontractors.** Consultant shall include all subcontractors as insureds under its policies or shall furnish separate certificates and endorsements for each subcontractor. All coverages for subcontractors shall be subject to all of the requirements stated herein.

**4.4.4 Deductibles and Self-Insured Retentions.** Consultant shall disclose to and obtain the approval of City for the self-insured retentions and deductibles before beginning any of the services or work called for by any term of this Agreement.

During the period covered by this Agreement, only upon the prior express written authorization of the City, Consultant may increase such deductibles or self-insured retentions with respect to City, its officers, employees, agents, contractors, consultants, and volunteers. The City may condition approval of an increase in deductible or self-insured retention levels with a requirement that Consultant procure a bond, guaranteeing payment of losses and related investigations, claim administration, and defense expenses that is satisfactory in all respects to the City.

**4.4.5 Notice of Reduction in Coverage.** In the event that any coverage required by this section is reduced, limited, or materially affected in any other manner, Consultant shall provide written notice to City at Consultant's earliest possible opportunity and in no case later than five days after Consultant is notified of the change in coverage.

**4.5 Remedies.** In addition to any other remedies City may have if Consultant fails to provide or maintain any insurance policies or policy endorsements to the extent and within the time herein required, City may, at its sole option exercise any of the following remedies, which are alternatives to other remedies City may have and are not the exclusive remedy for Consultant's breach:

- Obtain such insurance and deduct and retain the amount of the premiums for such insurance from any sums due under the Agreement;
- Order Consultant to stop work under this Agreement or withhold any payment that becomes due to Consultant hereunder, or both stop work and withhold any payment, until Consultant demonstrates compliance with the requirements hereof; and/or
- Declare Consultant in material breach of the Agreement and terminate the Agreement.

- 4.6 **Waiver.** The Risk Manager of the City has the authority to waive or vary any provision of Sections 4.2 through 4.5. Any such waiver or variation shall not be effective unless made in writing.

**Section 5. INDEMNIFICATION AND CONSULTANT'S RESPONSIBILITIES.** Consultant shall indemnify, defend with counsel reasonably acceptable to the City, and hold harmless the City and its officials, officers, employees, agents, contractors, consultants, and volunteers from and against any and all losses, liability, claims, suits, actions, damages, and causes of action arising out of any personal injury, bodily injury, loss of life, or damage to property, or any violation of any federal, state, or municipal law or ordinance, to the extent caused, in whole or in part, by the willful misconduct or negligent acts or omissions of Consultant or its employees, subcontractors, or agents, by acts for which they could be held strictly liable, or by the quality or character of their work. The foregoing obligation of Consultant shall not apply when (1) the injury, loss of life, damage to property, or violation of law arises wholly from the negligence or willful misconduct of the City or its officers, employees, agents, contractors, consultants, or volunteers and (2) the actions of Consultant or its employees, subcontractor, or agents have contributed in no part to the injury, loss of life, damage to property, or violation of law. It is understood that the duty of Consultant to indemnify and hold harmless includes the duty to defend as set forth in Section 2778 of the California Civil Code. Acceptance by City of insurance certificates and endorsements required under this Agreement does not relieve Consultant from liability under this indemnification and hold harmless clause. This indemnification and hold harmless clause shall apply to any damages or claims for damages whether or not such insurance policies shall have been determined to apply. By execution of this Agreement, Consultant acknowledges and agrees to the provisions of this Section and that it is a material element of consideration.

In the event that Consultant or any employee, agent, or subcontractor of Consultant providing services under this Agreement is determined by a court of competent jurisdiction or the California Public Employees Retirement System (PERS) to be eligible for enrollment in PERS as an employee of City, Consultant shall indemnify, defend, and hold harmless City for the payment of any employee and/or employer contributions for PERS benefits on behalf of Consultant or its employees, agents, or subcontractors, as well as for the payment of any penalties and interest on such contributions, which would otherwise be the responsibility of City.

**Section 6. STATUS OF CONSULTANT.**

- 6.1 **Independent Contractor.** At all times during the term of this Agreement, Consultant shall be an independent contractor and shall not be an employee of City. City shall have the right to control Consultant only insofar as the results of Consultant's services rendered pursuant to this Agreement and assignment of personnel pursuant to Subparagraph 1.3. Otherwise, City shall not have the right to control the means by which Consultant accomplishes services rendered pursuant to this Agreement. Notwithstanding any other City, state, or federal policy, rule, regulation, law, or ordinance to the contrary, Consultant and any of its employees, agents, and subcontractors providing services under this Agreement shall not qualify for or become entitled to, and hereby agree to waive any and all claims to, any compensation, benefit, or any incident of employment by City, including



but not limited to eligibility to enroll in the California Public Employees Retirement System (PERS) as an employee of City and entitlement to any contribution to be paid by City for employer contributions and/or employee contributions for PERS benefits.

- 6.2 **Consultant No Agent.** Except as City may specify in writing, Consultant shall have no authority, express or implied, to act on behalf of City in any capacity whatsoever as an agent. Consultant shall have no authority, express or implied, pursuant to this Agreement to bind City to any obligation whatsoever.

## **Section 7. LEGAL REQUIREMENTS.**

- 7.1 **Governing Law.** The laws of the State of California shall govern this Agreement.
- 7.2 **Compliance with Applicable Laws.** Consultant and any subcontractors shall comply with all laws applicable to the performance of the work hereunder.
- 7.3 **Other Governmental Regulations.** To the extent that this Agreement may be funded by fiscal assistance from another governmental entity, Consultant and any subcontractors shall comply with all applicable rules and regulations to which City is bound by the terms of such fiscal assistance program.
- 7.4 **Licenses and Permits.** Consultant represents and warrants to City that Consultant and its employees, agents, and any subcontractors have all licenses, permits, qualifications, and approvals of whatsoever nature that are legally required to practice their respective professions. Consultant represents and warrants to City that Consultant and its employees, agents, any subcontractors shall, at their sole cost and expense, keep in effect at all times during the term of this Agreement any licenses, permits, and approvals that are legally required to practice their respective professions and to perform this Agreement. In addition to the foregoing, Consultant and any subcontractors shall obtain and maintain during the term of this Agreement valid business license from City.
- 7.5 **Nondiscrimination and Equal Opportunity.** Consultant shall not discriminate, on the basis of a person's race, religion, color, national origin, age, physical or mental handicap or disability, medical condition, marital status, sex, or sexual orientation, against any employee, applicant for employment, subcontractor, bidder for a subcontract, or participant in, recipient of, or applicant for any services or programs provided by Consultant under this Agreement. Consultant shall comply with all applicable federal, state, and local laws, policies, rules, and requirements related to equal opportunity and nondiscrimination in employment, contracting, and the provision of any services that are the subject of this Agreement, including but not limited to the satisfaction of any positive obligations required of Consultant thereby.

Consultant shall include the provisions of this Subsection in any subcontract approved by the City or this Agreement.

**Section 8. TERMINATION AND MODIFICATION.**

- 8.1 Termination.** City may terminate this Agreement at any time and without cause upon written notification to Consultant.

In the event of termination, Consultant shall be entitled to compensation for services performed prior to the effective date of termination as provided in Section 2. City, however, may condition payment of such compensation upon Consultant delivering to City any or all documents, photographs, computer software, video and audio tapes, and other materials provided to Consultant or prepared by or for Consultant or the City in connection with this Agreement.

- 8.2 Extension.** City may, in its sole and exclusive discretion, extend the end date of this Agreement beyond that provided for in Subsection 1.1. Any such extension shall require a written amendment to this Agreement, as provided for herein. Consultant understands and agrees that, if City grants such an extension, City shall have no obligation to provide Consultant with compensation beyond the maximum amount provided for in this Agreement. Similarly, unless authorized by the City, City shall have no obligation to reimburse Consultant for any otherwise reimbursable expenses incurred during the extension period.

- 8.3 Amendments.** The parties may amend this Agreement only by a writing signed by all the parties.

- 8.4 Assignment and Subcontracting.** City and Consultant recognize and agree that this Agreement contemplates personal performance by Consultant and is based upon a determination of Consultant's unique personal competence, experience, and specialized personal knowledge. Moreover, a substantial inducement to City for entering into this Agreement was and is the professional reputation and competence of Consultant. Consultant may not assign this Agreement or any interest therein without the prior written approval of the City. Consultant shall not subcontract any portion of the performance contemplated and provided for herein, other than to the subcontractors listed in the Consultant's proposal, without prior written approval of the City.

- 8.5 Survival.** All obligations arising prior to the termination of this Agreement and all provisions of this Agreement allocating liability between City and Consultant shall survive the termination of this Agreement.

- 8.6 Options upon Breach by Consultant.** If Consultant materially breaches any of the terms of this Agreement, City's remedies shall include, but not be limited to, any or all of the following:

- 8.6.1** Immediate cancellation of the Agreement;

8.6.2 Retention of the plans, specifications, drawings, reports, design documents, and any other work product prepared by Consultant pursuant to this Agreement prior to cancellation; and

8.6.3 Retention of a different consultant at Consultant's cost to complete the work described in Exhibit A not finished by Consultant.

## **Section 9. KEEPING AND STATUS OF RECORDS.**

9.1 **Records Created as Part of Consultant's Performance.** All reports, data, maps, models, charts, studies, surveys, photographs, memoranda, plans, studies, specifications, records, files, or any other documents or materials, in electronic or any other form, that Consultant prepares or obtains pursuant to this Agreement and that relate to the matters covered hereunder shall be the property of the City. Consultant hereby agrees to deliver those documents to the City at any time upon demand of the City. It is understood and agreed that the documents and other materials, including but not limited to those described above, prepared pursuant to this Agreement are prepared specifically for the City and are not necessarily suitable for any future or other use. Failure by Consultant to deliver these documents to the City within the time period specified by the City shall be a material breach of this Agreement. City and Consultant agree that, until final approval by City, all data, plans, specifications, reports and other documents are preliminary drafts not kept by the City in the ordinary course of business and will not be disclosed to third parties without prior written consent of both parties.

9.2 **Consultant's Books and Records.** Consultant shall maintain any and all ledgers, books of account, invoices, vouchers, canceled checks, and other records or documents evidencing or relating to charges for services or expenditures and disbursements charged to the City under this Agreement for a minimum of three (3) years, or for any longer period required by law, from the date of final payment to the Consultant to this Agreement.

9.3 **Inspection and Audit of Records.** Any records or documents that Section 9.2 of this Agreement requires Consultant to maintain shall be made available for inspection, audit, and/or copying at any time during regular business hours, upon oral or written request of the City. Under California Government Code Section 8546.7, if the amount of public funds expended under this Agreement exceeds TEN THOUSAND DOLLARS (\$10,000.00), the Agreement shall be subject to the examination and audit of the State Auditor, at the request of City or as part of any audit of the City, for a period of three (3) years after final payment under the Agreement.

## **Section 10 MISCELLANEOUS PROVISIONS.**

10.1 **Attorneys' Fees.** If a party to this Agreement brings any action, including an action for declaratory relief, to enforce or interpret the provision of this Agreement, the prevailing

party shall be entitled to reasonable attorneys' fees in addition to any other relief to which that party may be entitled. The court may set such fees in the same action or in a separate action brought for that purpose.

- 10.2 Venue.** In the event that either party brings any action against the other under this Agreement, the parties agree that trial of such action shall be vested exclusively in the state courts of California in the County of Santa Clara or in the United States District Court for the Northern District of California.
- 10.3 Severability.** If a court of competent jurisdiction finds or rules that any provision of this Agreement is invalid, void, or unenforceable, the provisions of this Agreement not so adjudged shall remain in full force and effect. The invalidity in whole or in part of any provision of this Agreement shall not void or affect the validity of any other provision of this Agreement.
- 10.4 No Implied Waiver of Breach.** The waiver of performance or any breach of a specific provision of this Agreement does not constitute a waiver of any other breach of that term or any other term of this Agreement.
- 10.5 Successors and Assigns.** The provisions of this Agreement shall inure to the benefit of and shall apply to and bind the successors and assigns of the parties.
- 10.6 Use of Recycled Products.** Consultant shall prepare and submit all reports, written studies and other printed material on recycled paper to the extent it is available at equal or less cost than virgin paper.
- 10.7 Conflict of Interest.** Consultant may serve other clients, but none whose activities within the corporate limits of City or whose business, regardless of location, would place Consultant in a "conflict of interest," as that term is defined in the Political Reform Act, codified at California Government Code Section 81000 *et seq.*

Consultant shall not employ any City official in the work performed pursuant to this Agreement. No officer or employee of City shall have any financial interest in this Agreement that would violate California Government Code Sections 1090 *et seq.*

Consultant hereby warrants that it is not now, nor has it been in the previous twelve (12) months, an employee, agent, appointee, or official of the City. If Consultant were an employee, agent, appointee, or official of the City in the previous twelve months, Consultant warrants that it did not participate in any manner in the forming of this Agreement. Consultant understands that, if this Agreement is made in violation of Government Code §1090 *et seq.*, the entire Agreement is void and Consultant will not be entitled to any compensation for services performed pursuant to this Agreement, including reimbursement of expenses, and Consultant will be required to reimburse the City for any sums paid to the Consultant. Consultant understands that, in addition to the foregoing, it

may be subject to criminal prosecution for a violation of Government Code § 1090 and, if applicable, may be disqualified from holding public office in the State of California.

Consultant certifies that it has not paid any direct or contingent fee, contribution, donation or consideration of any kind to any firm, organization, or person (other than a bona fide employee of Consultant) in connection with procuring this Agreement, nor has Consultant agreed to employ or retain any firm, organization, or person in connection with the performance of this Agreement as a condition for obtaining this Agreement.

- 10.8 **Solicitation.** Consultant agrees not to solicit business at any meeting, focus group, or interview related to this Agreement, either orally or through any written materials.
- 10.9 **Contract Administration.** The City's Economic Development Manager who is authorized to act for, and on behalf of, City shall administer this Agreement. All correspondence shall be directed to or through the Contract Administrator or his or her designee.
- 10.10 **Notices.** Any written notice to Consultant shall be sent to:  
Paul Anderson, Principal  
Keyser Marston Associates, Inc.  
500 South Grand Avenue, Suite 1480  
Los Angeles, CA 90071
- Any written notice to City shall be sent to:  
Diana Whitecar, Economic Development Manager  
455 East Calaveras Boulevard  
Milpitas, California 95035
- 10.11 **Professional Seal.** Where applicable in the determination of the City, the first page of a technical report, first page of design specifications, and each page of construction drawings shall be stamped/sealed and signed by the licensed professional responsible for the report/design preparation.
- 10.12 **Integration.** This Agreement, including the exhibits, represents the entire and integrated agreement between City and Consultant and supersedes all prior negotiations, representations, or agreements, either written or oral.
- 10.13 **Exhibits.** All exhibits referenced in this Agreement are incorporated by reference herein.

CITY OF MILPITAS

CONSULTANT

\_\_\_\_\_  
Charles Lawson, Interim City Manager

ATTEST:

\_\_\_\_\_  
Mary Lavelle, City Clerk

APPROVED AS TO FORM:

\_\_\_\_\_  
Steven T. Mattas, City Attorney

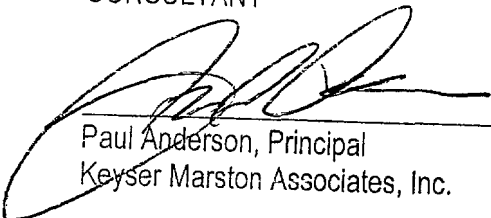
APPROVED AS TO CONTENT: ,

*Diana Whitcan*  
\_\_\_\_\_  
Department/Division Head

APPROVED:

\_\_\_\_\_  
Finance Director/Risk Manager

Document1

  
\_\_\_\_\_  
Paul Anderson, Principal  
Keyser Marston Associates, Inc.

942363741  
\_\_\_\_\_  
Taxpayer Identification Number

EXHIBIT A  
SCOPE OF SERVICES

## **I. PROJECT UNDERSTANDING AND APPROACH**

The Redevelopment Agency of the City of Milpitas (the "Agency") would like assistance in evaluating, and as warranted, assistance in amending to merge (the "Amendment" or "Merger") Milpitas Redevelopment Project No. 1 ("Project Area No. 1") and the Great Mall Redevelopment Project (the "Merged Project Area," "Constituent Project Areas" or "Projects"). The primary intent of considering a merger is for the Agency to facilitate sign construction that will include advertising for businesses in the Merged Project Area. The signs would contribute to revitalization of the Merged Project Area by increasing business visibility and directing patrons to businesses in the Merged Project Area. The proposed Merger would not include the addition of territory or the increasing or altering the financial provisions of the respective Redevelopment Plans. Specifically, Project Area No. 1 is a tax increment generating project and the Great Mall Redevelopment Project is a non-tax increment generating project and the Merger would not change these basic financial provisions. The Merger would allow the construction of signs in either of the Constituent Project Areas that would benefit businesses throughout the Merged Project Area. Although not currently contemplated, if necessary, the Merger could allow money from Project Area No. 1 to assist in funding sign construction in the Great Mall Redevelopment Project Area.

Keyser Marston Associates, Inc. (KMA) proposes to provide redevelopment plan amendment services to the Agency. Wagstaff and Associates, as a subconsultant to KMA, would prepare the environmental review analysis, presumably an Initial Study/EIR. KMA would be responsible for the overall coordination of the Amendment effort, and would prepare the analysis evaluating the feasibility of merging Projects including financial feasibility. This would include preparing and monitoring the Amendment adoption schedule, and preparing the required documents, assisting in drafting staff reports and attending meetings. Because both Project Area No. 1 and the Great Mall Redevelopment Project are being amended two ordinances would be required.

Because the Agency is not proposing to adopt or reinstate eminent domain authority in the Constituent Project Areas, the formation of a Project Area Committee (PAC) will not be required. In lieu of a PAC, the Agency will follow an alternative community participation process including holding an information meeting to present the Amendment and to receive input from property owners and occupants in the proposed Merged Project Area. KMA will provide all of the necessary services to facilitate the community outreach effort.



## **II. SCOPE**

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The following scope of services is divided into two service areas: Document Preparation, and Project Coordination. These services represent the full range of services required to take the Agency through the Plan amendment process.

### **DOCUMENT PREPARATION**

#### **A. PLAN AMENDMENT DOCUMENT PREPARATION**

##### **Task 1 - Schedule of Actions**

KMA will prepare a detailed and summary schedule of actions identifying all activities required by law leading to the adoption of the Amendment. The schedule lists actions, responsible parties, scheduled dates and documents to be prepared.

Product:..... Detailed and Summary Schedule of Actions

##### **Task 2 - Taxing Agency Notices**

The affected taxing agencies are required to be notified of the Agency's intent to amend the Redevelopment Plan. KMA will identify the name, address and contact for the taxing agencies in the Merged Project Area. For staff's reference and use, KMA will also provide staff with an electronic file.

Product:..... Required Taxing Agency Notices, Mailing List, and Electronic Version of the File

##### **Task 3 - Preliminary Report**

KMA will prepare one draft and one final version of the Preliminary Report. KMA's approach to preparing the key documentation for the merger is to describe the reasons and benefits to merging projects (Preliminary Report and Report to City Council) is to provide a background on existing conditions, Agency accomplishments, and proposed activities to eliminate remaining blight. Although a financial feasibility analysis is not required, KMA recommends that a financial analysis be included in the Preliminary Report and Report to City Council describing the effect of merging projects on projected tax increment, bonding capacity and ability and timing to financing remaining redevelopment projects.

Product:..... One Draft and One Final Version of the Preliminary Report<sup>1</sup>

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<sup>1</sup> Agency staff will be responsible for duplication and distribution.

#### Task 4 - Report to the City Council

KMA will prepare one draft and one final version of the Report to the City Council. The Report will be prepared in accordance with the requirements of Section 33352 of the CRL, and will incorporate the evidence from which the City Council will make certain findings upon adoption of the Amendment. The Report to the City Council will also contain a summation of the process followed in adopting the Amendment as required in the CRL, and the information contained in the Preliminary Report in addition to the following:

- The five-year implementation plan; (will incorporate the existing Implementation Plans);
- An explanation of why redevelopment cannot be accomplished by the other government activities or the private sector acting alone;
- The plan or method of relocation for families or persons temporarily or permanently displaced;
- The environmental review document (by reference);
- The report and recommendations of the Planning Commission;
- A summary record of consultations with the community;
- The neighborhood impact report; and
- The summary of consultations with affected taxing entities.

Product:..... One Draft and One Final Version of the Report to the City Council

#### **B. ENVIRONMENTAL REVIEW DOCUMENT PREPARATION**

##### **2.1 Environmental Review Approach and Scope**

The intent of the proposed merger is to implement construction of new signs within the added parcels along Milpitas segments of I-880 and I-680. The signs are intended to advertise businesses within the Merged Project Area. At this preliminary point, it is assumed that the signs would have potentially significant aesthetic impacts, including possible adverse effects on scenic vistas, possible degradation of the existing visual character of site surroundings, and/or

creation of new sources of substantial light or glare (CEQA Guidelines Appendix G, Environmental Checklist Form, item I, Aesthetics). It is also assumed that, although mitigations may be identified which would reduce such aesthetic impacts, it may be determined that one or more identified significant visual effects remains unavoidable, a finding which would require preparation of an EIR (rather than a mitigated negative declaration) and City/Agency adoption of a statement of overriding considerations (pursuant to CEQA Guidelines sections 15091 and 15093). Temporary construction period noise and traffic impacts also warrant evaluation in the EIR. No other significant environmental effects are anticipated.

As set forth under CEQA, the scope of the program EIR will be limited to a description of those impacts and mitigation measures that can be identified at this time, without being highly speculative.

## **2.2 EIR Preparation Data Needs**

To facilitate EIR preparation, the following project description materials sufficient to permit adequate evaluation of project aesthetic and construction period impacts will be requested from Agency staff:

- narrative description of the anticipated sign design and construction characteristics and parameters, including sign types, setbacks from adjacent travel routes, dimensional ranges (overall heights, widths and depths), display surface dimensions and other characteristics, internal and remote illumination characteristics and timing, etc.;
- conceptual illustrative exhibits, such as preliminary site plans and elevations depicting the visual character of the signs as currently envisioned, including setbacks from adjacent travel routes, height and size ("sign envelope") ranges, etc.; and
- anticipated construction approach (access, staging, foundation preparation, equipment types, construction timing, etc.).

## **2.3 EIR Preparation Tasks**

Tasks and subtasks proposed to complete the EIR for the "project" are outlined below:

### **Task 1 - Initial Survey and Project Description**

- 1.1 Initial Staff Meeting
- 1.2 Field Survey
- 1.3 Data Collection and Review
- 1.4 Project Description

## Task 2 - EIR Scoping

- (a) Administrative Draft NOP/IS. Using City-preferred forms or the latest template from the CEQA Guidelines (Appendix G), Wagstaff and Associates will prepare a concise administrative draft Initial Study Checklist, including a preliminary project description and checklist determinations and narrative narrowing the scope of the EIR to aesthetics and construction period noise and traffic, and will prepare a companion administrative draft Notice of Preparation (NOP), for review and approval by City/Agency staff.
- (b) Public Release NOP/IS. A public release version of the NOP and Initial Study will be prepared, incorporating revisions to the Administrative Draft NOP/IS in response to City/Agency staff comments. One camera-ready version of the NOP/IS will be delivered to the Agency for distribution by the Agency to responsible and interested agencies.
- (c) Public Scoping Meeting. Wagstaff and Associates will also attend one (1) public scoping meeting, chaired by City staff or the Planning Commission, to assist in describing the EIR requirement and proposed preparation approach, identify the limited range of environmental issues to be evaluated, and receive and record public questions and comments on the EIR scope.

## Task 3 - Description of Setting, Potential Impacts and Mitigations

Subtask 3.1: Aesthetics. Potential daytime and nighttime visibility of the signs from nearby neighborhood and other important Milpitas vantage points, and associated visual impacts on these views and on the visual character of the affected travel routes through Milpitas, are anticipated significant environmental concerns.

(a) *Setting:* The relationship of the proposed signage parcels to important neighborhood and other community vantage points will also be photographed and described. Applicable City aesthetic goals and policies will identify, including any pertinent General Plan-identified important vistas, scenic routes, or visual gateways. Applicable state (Caltrans) aesthetic policies and regulations, if any, will also be identified.

(b) *Impacts:* The aesthetic effects of the project-facilitated new signs will be evaluated and described, including impacts on the visual character and image of affected travel routes, and on identified important neighborhood vantage points, vistas, or visual gateways. The consistency of the anticipated sign design characteristics and visual impacts with applicable City and State aesthetic policies and regulations will also be addressed.

(c) *Optional Impact Analysis Aids:* The possible addition to the EIR scope of two (optional) visual impact evaluation actions will be discussed with City staff to facilitate understanding of the potential visual impacts of the signs: (1) installation of temporary storey poles to indicate anticipated sign locations, heights, and associated visibility from key vantage points; and/or (2) preparation of computer-assisted photomontage depictions of anticipated sign envelopes from one or more selected key vantage points (the sign envelope could be depicted in translucent form, perhaps in color on a black and white photo background). The EIR cost proposal included herein includes in a footnote the estimated added cost for the photo-simulation option. It is assumed that any storey pole installation would be completed by the City.

(d) *Mitigation:* As warranted and to the extent feasible, sign design guidelines, modifications and/or refinements will be recommended to reduce identified significant visual impacts. At this preliminary point, it is assumed that, although measures may be identified which will substantially reduce the potential aesthetic impacts of the signs, the EIR may still conclude that one or more of the identified visual impacts remains significant and unavoidable, and will therefore require City/Agency adoption of a statement of overriding considerations (pursuant to CEQA Guidelines sections 15091 and 15093).

Subtask 3.2: Noise. Project (sign) temporary construction period noise and vibration impacts, if any, on nearby sensitive uses will be evaluated and described and any associated mitigation needs, will be identified.

Subtask 3.4: Transportation. Project (sign) temporary construction period traffic impacts, if any, will also be evaluated and described, and any associated mitigation needs will be identified.

#### Task 4 - Project Consistency with Local and Regional Plans

In keeping with CEQA requirements for EIR content, Wagstaff and Associates will prepare a brief discussion of project relationships to applicable local and regional plans and policies adopted for environmental purposes (especially, the Milpitas General Plan and any applicable Caltrans policies).

#### Task 5 - Alternative to the Proposed Action

In keeping with CEQA requirements for EIR content, Wagstaff and Associates will also prepare a brief identification and comparative evaluation of possible mitigating alternatives to the propose action (e.g., possible alternative sign locations, etc.).

## Task 6 - Preparation of Draft EIR

Subtask 6.1: Administrative Draft EIR. Six (6) copies of an Administrative Draft EIR will be submitted to City/Agency staff for internal team review and comment. Subtask 6.2: Public Release Draft EIR. Wagstaff and Associates expects that City staff will submit up to three sets of comments (one set each from City staff, City legal counsel, and the redevelopment consultant) regarding requested changes to the Administrative Draft EIR. Seventy-five (75) copies of the Draft EIR will then be submitted to City/Agency staff for circulation to interested agencies and the public.

## Task 7 - Preparation of Mitigation Monitoring Checklist

To satisfy Section 21081.6 of the Public Resources Code, a documented record of implementation will be necessary. Wagstaff and Associates will prepare a concise mitigation monitoring and reporting checklist for City/Agency staff review and approval.

## Task 8 - Meetings and Public Hearings

John Wagstaff, Principal-in-Charge, and/or Ray Pendro, Wagstaff and Associates Project Manager, will attend up to two (2) additional staff meetings and up to two (2) public hearings (Planning Commission and City Council/Redevelopment Agency) to assist the City team in presenting the EIR findings and/or answer questions regarding the CEQA process and EIR content.

## C. PROJECT COORDINATION

### Task 1 - Schedule Monitoring and Project Management

This task will include coordinating with staff, Wagstaff consultant and legal counsel on upcoming actions and updating the full schedule once, and the summary schedule up to five times. Furthermore, as part of this project management task, if the Agency receives written objections on the Amendment, KMA staff will be available on a time- and materials-basis to assist in preparing the required responses to the received written objections.

Product:..... Revised Schedule of Actions and Ongoing Coordination with Staff

### Task 2 - Consultations with Taxing Agencies

KMA will provide responses to questions raised by affected taxing agencies. It is assumed that there will be minimal need for consultations. However, if substantial responses are required or meetings are necessary, KMA will provide these services, as necessary, on a time and materials basis.

Product:..... Prepare Responses to Affected Taxing Agencies

### Task 3 - Community Meeting

KMA will conduct a community meeting and present the proposed merger and the Agency's redevelopment program. KMA will tailor the presentation for the venue and may include a PowerPoint presentation in addition to coordinating the meetings agenda and handouts. KMA will provide the Agency with notices for the community information meeting. It is assumed that staff will hire a mailing house to generate mailing lists for owners and occupants as well as duplication and handling of mail for the community meeting/joint public hearing notice.

Product:..... Conduct Community Meeting

### Task 4 - Staff Reports

KMA will work with staff to prepare all necessary staff reports. This will include summarizing the proposed actions and providing background information for incorporation into the staff reports.

Product:..... Staff Reports

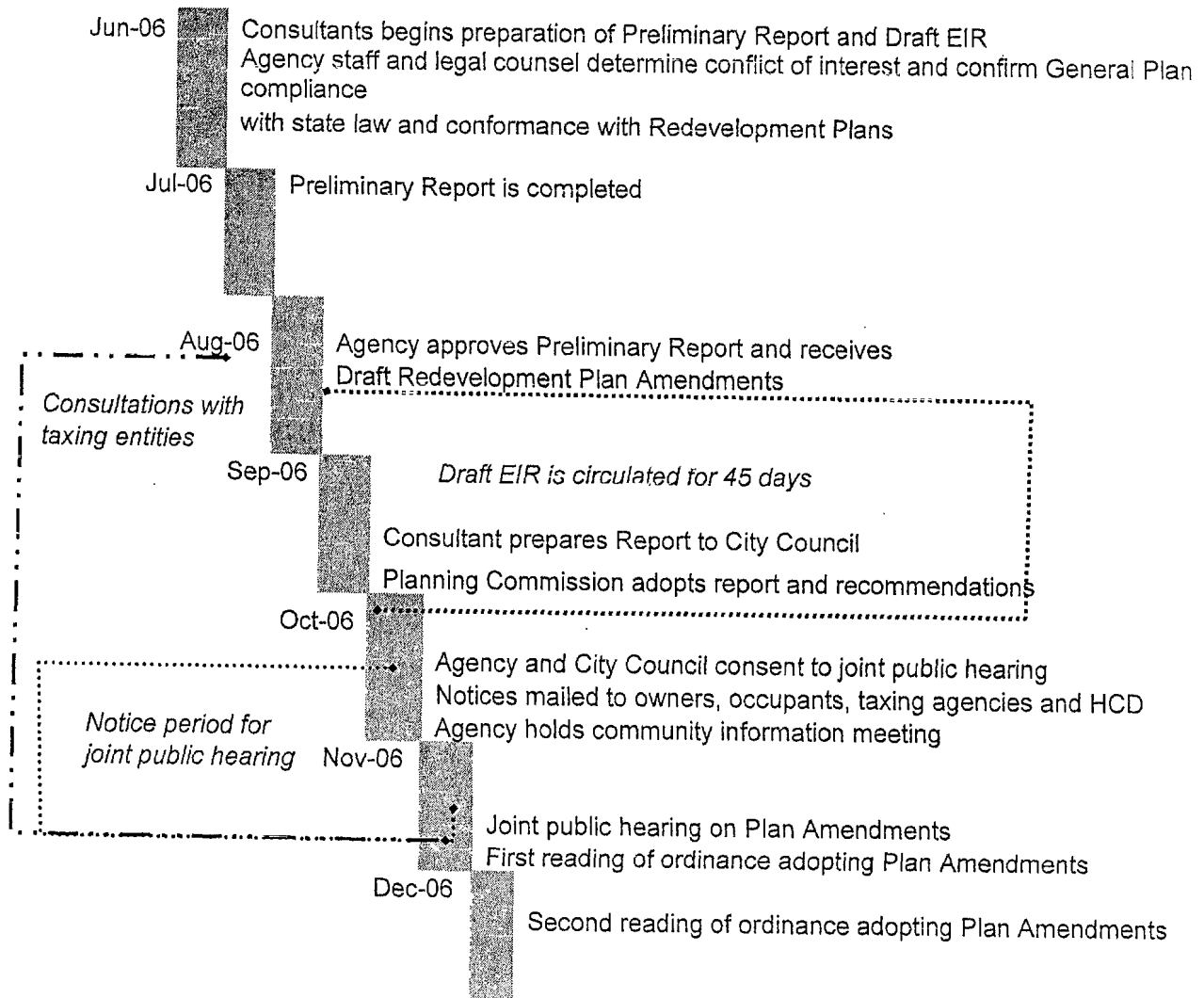
### Task 5 - Attendance at City Meetings

KMA anticipates attending/making presentations at a kick-off meeting with staff, hosting a community meeting (reference above), attending the Agency meeting approving the Preliminary Report, and attending the joint public hearing on the amendment adoption. KMA will attend additional meetings as requested to be billed on a time- and materials-basis.

Product:..... Attendance at Three Additional Meetings

### III. SCHEDULE

As shown below, KMA proposes to make best effort to complete the scope of services within seven (7) months with a adoption date of December 2006.





**BUDGET FOR PLAN AMENDMENT SERVICES****FEE ESTIMATE**

		<b>Amendment to Merge Projects</b>
<b>A. DOCUMENT PREPARATION</b>		
	<b><i>Plan Amendment Documents</i></b>	
Task 1	Schedule of Actions	\$5,000.00
Task 2	Taxing Agency Notices	\$1,000.00
Task 3	Preliminary Report	\$15,000.00
Task 4	Report to the City Council	\$15,000.00
<b>Subtotal</b>		<b>\$36,000.00</b>
<b>B. ENVIRONMENTAL REVIEW DOCUMENT PREPARATION</b>		
Task 1	Initial Surveys and Project Description	\$4,900.00
Task 2	EIR Scoping (NOP/Checklist and Scoping Meeting)	\$5,600.00
Task 3	Description of Setting, Impacts and Mitigations	\$9,105.00
Task 4	Project Consistency with Local and Regional Plans	\$2,300.00
Task 5	Alternatives to the Proposed Actions	\$2,000.00
Task 6	Draft EIR	\$8,000.00
Task 7	Mitigation Monitoring Checklist	\$1,000.00
Task 8	Meetings (4) and Public Hearings (2)	\$11,200.00
<b>Subtotal</b>		<b>\$44,105.00<sup>1</sup></b>
<b>C. PROJECT COORDINATION SERVICES</b>		
Task 1	Schedule Monitoring & Project Management	\$10,000.00
Task 2	Consultations with Taxing Agencies	\$2,000.00
Task 3	Community Meeting (1)	\$2,000.00
Task 4	Staff Reports	\$5,000.00
Task 5	Attendance at City Meetings	\$3,000.00
<b>Subtotal</b>		<b>\$22,000.00</b>
<b>EXPENSES</b>		<b>\$5,000.00</b>
<b>GRAND TOTAL</b>		<b>\$107,105.00</b>

<sup>1</sup> The EIR preparation cost estimate is preliminary; It is expected that the scope and budget will be revised and refined based upon various aspects of the proposed work in consultation with City staff as necessary to meet additional or reduced CEQA needs. The budget estimate is based on the assumption that the EIR content can be substantially based on and tiered upon the City's Midtown Specific Plan EIR and other available existing documentation. Optional additional components and costs not listed in this table include possible photo-montage visual simulations (assume approx. \$3,000 per simulation) and possible storey pole installation coordination (assume approximately \$3,200).

EXHIBIT B  
COMPENSATION SCHEDULE

#### **IV. BUDGET, EXPENSES AND PAYMENT SCHEDULE**

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As detailed on the table following this page, KMA proposes to provide consulting services for the scope of services described in this proposal for \$107,105. This includes \$44,105 for preparation of the Environmental Impact Report. The cost estimate for environmental services also includes printing and delivery to the City of six (6) copies of the Administrative Draft EIR, seventy-five (75) copies of the Draft EIR, and five (5) copies of the Mitigation Monitoring Checklist. KMA job related expenses include travel, hotels, electronic data, graphics, and in-house printing will be billed separately. KMA will submit an invoice for work billed on a time-and materials-basis.

##### **WAGSTAFF AND ASSOCIATES HOURLY FEE SCHEDULE**

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	<b><u>2005/2006</u></b>
PRINCIPAL (J. WAGSTAFF)	\$170.00
PROJECT MANAGER (R. PENDRO)	\$155.00
SENIOR PLANNER	\$145.00
GRAPHICS STAFF	\$ 85.00

##### **KEYSER MARSTON ASSOCIATES, INC. HOURLY FEE SCHEDULE**

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	<b><u>2005/2006</u></b>
A. JERRY KEYSER *	\$245.00
MANAGING PRINCIPALS*	\$240.00
PRINCIPALS*	\$230.00
MANAGERS*	\$185.00
SENIOR ASSOCIATES	\$165.00
ASSOCIATES	\$145.00
SENIOR ANALYSTS	\$130.00
ANALYSTS	\$ 110.00
TECHNICAL STAFF	\$ 85.00
ADMINISTRATIVE STAFF	\$ 75.00

Directly related job expenses not included in the above rates are: auto mileage, air fares, hotels and motels, meals, car rentals, taxis, telephone calls, delivery, electronic data processing, graphics and printing. Directly related job expenses will be billed at 110% of cost.

Monthly billings for staff time and expenses incurred during the period will be payable within thirty (30) days of invoice date. A charge of 1% per month will be added to all past due accounts.

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\*Rates for individuals in these categories will be increased by 50% for time spent in court testimony.



## City of Milpitas, California

BUDGET CHANGE FORM

Type of Change	From		To	
	Account	Amount	Account	Amount
Check one: <input checked="" type="checkbox"/> Budget Appropriation <input type="checkbox"/> Budget Transfer	390-2940	\$127,105	390-1164237	\$127,105

**Explain the reason for the budget change:**

On August 2, 2005 the City Council authorized the City Manager to identify a consultant to assist with the plan amendment and to bring back a negotiated contract for Redevelopment Agency approval once a consultant was selected. Staff issued a Request for Proposal for consultant services earlier this year and held interviews with the three respondents. Of the three, Keyser Marston Associates, Inc., presented a team that could perform the work required to merge the two local redevelopment areas in the most efficient and cost effective scenario.

A redevelopment plan amendment is required so that businesses located within both the Great Mall and Project Area No. 1 project areas can utilize new and existing highway signage. The first user, Piercey Toyota, will locate and construct the signs as part of the Piercey Toyota dealership. As the redevelopment project areas will be merged, these new and reconstructed signs will also have the capacity to serve other businesses within both project areas.

New directional signs located along Calaveras Boulevard and other streets would provide ease of access to the Great Mall, Main Street businesses and other business centers once customers exit the freeways.

As agreed to at the August 2, 2005 meeting, Piercey Toyota will reimburse the Agency for the cost of the plan amendment consultant and City Attorney fees estimated at \$20,000. Since funding for this consultant was not included in the FY 2005-06 Economic Development budget, staff also requests an appropriation of \$127,105 from the Redevelopment Agency Project Fund to Economic Development operating budget. Reimbursements from Piercey Toyota will be deposited into the Agency Project Fund.

Approve a budget appropriation of \$127,105 from the Redevelopment Agency Project Fund to Economic Development for the consultant services.

☒ Check if City Council Approval required.

Meeting Date: June 06, 2006

Itemization of funds, if needed:			Amount
Requested by:	Division Head: <i>Brian Whittican</i>	Date:	5-26-06
	Department Head:	Date:	
Reviewed by:	Finance Director: <i>Mr C Karl</i>	Date:	5/26/06
Approved by:	City Manager:	Date:	
Date approved by City Council, if required:			Confirmed by: